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Supreme Court, U.S.
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No. 07A312

IN THE
Supreme Court of the United States

Dennis Frichtl,

Petitioner,

v.

United States of America,

Respondent,

On Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. **Whether a district court's denial of a criminal defendant's right to be represented by retained counsel of choice before commencement of trial without allowing the defendant or counsel to respond to the grounds for such denial creates a constitutional infirmity which is the basis for an immediate interlocutory appeal.**

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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IN THE

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Dennis Frichtl,

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v.

United States of America,

Respondent,

On Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, **Dennis Frichtl**, respectfully prays that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals entered August 8, 2007 dismissing for lack of jurisdiction the appeal of the disqualification of Mr. Frichtl's counsel of choice by the United States District Court for the Southern District of Illinois in violation of Petitioner's Sixth Amendment right to counsel of choice and Petitioner's due process rights

under the Fifth Amendment, based on this Honorable Court's recent decision *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557,2563 (2006).

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit filed an order dismissing the appeal for lack of jurisdiction (Docket no. 07-2576, App. *infra*, 1a) on August 8, 2007. The dismissal is unreported.

The Petitioner timely filed with the Seventh Circuit an appeal of the disqualification on July 6, 2007. The Petitioner timely filed a jurisdictional memorandum on July 24, 2007.

The Seventh Circuit filed an order requiring the Respondent to file a response to the jurisdictional memorandum on July 25, 2007. On August 2, 2007 the Respondent filed its response and on August 8, 2007 the Seventh Circuit, citing to *Flanagan v.*

United States, 465 U.S. 259, 260 (1984), filed an order dismissing the appeal.

JURISDICTION

The dismissal by the court of appeals was entered August 8, 2007. Motion to stay the mandate pending filing writ of certiorari was denied on September 4, 2007. Petition for reconsideration was denied on September 24, 2007. Justice Stevens denied the application for stay pending the filing and disposition of a petition for a writ of certiorari on October 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF MATERIAL FACTS

Petitioner Dennis Frichtl was indicted on April 5, 2007, in a multiple defendant indictment below (United States District Court for the Southern District of Illinois, Docket no. 07 CR 40040).

In the case, the United States prior to close of business on Friday June 22, 2007 filed a motion to disqualify counsel (document no. 45). This motion was addressed on the next business day, Monday, June 25, 2007 by the trial court without regard to the Federal Rules of Criminal Procedure, or the local rules of the Southern District of Illinois which would have allowed the Petitioner and undersigned counsel an opportunity to respond to the motion to show, in fact, that in spite of the Government's allegations, no conflict actually exists.

No due process under the Fifth Amendment to the United States Constitution was allowed for the Petitioner to establish that he was being deprived of his rights under the Sixth Amendment to the United States Constitution to choose his own counsel whom he can afford, nor was he allowed to waive any potential conflict of interest even though he and the

other defendants had previously filed conflict of interest waivers (document no. 30).

No evidence was taken of any kind, nor was the Petitioner questioned by the Court as to his preferences regarding counsel. (See generally, transcript of proceedings of June 25, 2007, case no. 4:07-CR-40040).

The Petitioner's counsel of choice was terminated by the Court and the Petitioner was severed from the pending trial in the same June 25, 2007 hearing.

An appeal of the termination/disqualification of Dennis Frichtl's counsel of choice was filed with the United States Court of Appeals for the Seventh Circuit on July 6, 2007. On July 24, 2007 the Petitioner's jurisdictional memorandum was filed in the Seventh Circuit.

On July 25, 2007 the Respondent was ordered to file a response to the Petitioner's jurisdictional memorandum. The Respondent filed its response on August 8, 2007, and the Seventh Circuit's order dismissing the appeal for lack of jurisdiction was filed on August 8, 2007.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit in its order stated as its reason for dismissal that because Mr. Frichtl's criminal case was not at an end he "may not immediately appeal a disqualification order" citing to *Flanagan v. United States*, 465 U.S. 259, 260, 104 S.Ct. 1051, 1052 (1984).

In light of this Court's recent decision in *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), a clarification is required. In *Gonzalez-Lopez* this Court stated "[a] choice-of-counsel violation

occurs *whenever* the defendant's choice is wrongfully denied." *Id.* at 2565 (emphasis in original).

The Seventh Circuit in the underlying case dismissed the appeal of the disqualification based upon the holding in *Flanagan, supra* without reaching any of the constitutional issues raised.

The district court's violation of Mr. Frichtl's Fifth Amendment due process rights in failing to make any inquiry into the allegations raised by the government's motion to disqualify counsel prior to its granting the motion is clear.

In the case of joint representation Rule 44 of the Federal Rules of Criminal Procedure creates a duty that the court "promptly inquire to such joint representation and shall personally advise each defendant of his right to effective assistance of counsel . . . ." Even though the underlying case does not involve joint representation it mirrors the same

issues as those addressed in Federal Rules of Criminal Procedure, Rule 44.

At a minimum in the underlying case the district court should have made some inquiry into Mr. Frichtl's counsel's former representation of Mr. Frichtl's brothers/co-defendants. (They were and are represented by independent qualified counsel.) But the district court made no inquiry or factual finding prior to disqualifying the Petitioner's counsel of choice. Nor was Petitioner given the right to respond to the government's motion filed only one working day prior to the hearing.

This erroneous deprivation of counsel is a *per se* violation of Mr. Frichtl's Sixth Amendment rights. *Gonzalez-Lopez, supra,* at 2562. The Seventh Circuit has interpreted the holding in *Gonzalez-Lopez* stating that "the right to be represented by counsel of choice protects an interest in autonomy rather than

the accuracy of the trial. . . . the right's nature requires the trial to be rerun *even when there was no prejudice.*" *Rodriguez v. Chandler*, 492 F.3d 863, 866 (7th Cir. 2007) (emphasis in original).

It flies in the face of judicial economy and fundamental fairness for a defendant to be forced to undertake the emotional and financial burden of a criminal trial when it is already predetermined that in the event of a conviction the trial must be rerun.

"[P]rior to *Flanagan* a majority of federal appellate courts held disqualification orders to be immediately appealable." *Commonwealth of Pennsylvania v. Johnson*, 705 A.2d 830, 835 (1998), dissent, J. Zappala.

Furthermore, prior to *Flanagan* the Fifth Circuit, in an analogous case stated, "deferral of review until after completion of the trial would dissipate judicial resources and possibly jeopardize

the defendant's case . . . ." *United States v. Garcia*, 517 F.2d 272, 275 (5th Cir. 1975).

The Sixth Circuit, prior to *Flanagan*, in 1983 stated, "[t]o require a defendant in a criminal case to stand trial and risk conviction while deprived of the services of his chosen counsel without opportunity to test the legality of the order of disqualification is fundamentally unfair." *United States v. Phillips*, 699 F.2d 798, 802 (6th Cir. 1983).

In a case such as the instant appeal jurisdiction is not based upon a statute or rule of court, but rather a constitutional violation which amounts to "structural error" not subject to a "harmless error" review standard. Where the trial must be rerun due to the erroneous deprivation of the Petitioner's Sixth Amendment rights, it is in the best interest of all the parties to allow an immediate appeal.

The cost to the Petitioner both monetarily and emotionally of two trials is fundamentally unfair. Furthermore, the government must devote the manpower to putting on two prosecutions and the district court must calendar and preside over a second trial.

The issue of whether the "collateral order doctrine" should allow immediate interlocutory appellate jurisdiction in a case where the defendant's constitutional due process rights have been violated in the disqualification of counsel needs to be addressed.

According to the current interpretation of *Flanagan, supra* if a district court denied an indigent defendant the right to counsel, in violation of his Sixth Amendment rights as stated in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963), the

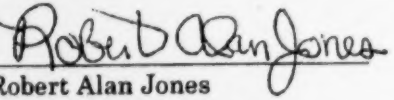
denial of counsel would not be immediately appealable.

This antagonism between this Honorable Court's holdings in *Flanagan* and *Gonzalez-Lopez* must be addressed in order to protect the constitutional rights of criminal defendants. And further to take into consideration judicial economy as well as fundamental fairness in the application of interlocutory appeals such as in the instant case.

CONCLUSION

Based on the foregoing, Petitioner Dennis Frichtl respectfully requests this Honorable Court grant his petition for a writ of certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60504

August 8, 2007

Before

Hon. William J. Bauer, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Diane S. Sykes, Circuit Judge

UNITED STATES OF AMERICA Plaintiff-Appellee	]	Appeal from the United States District Court for the Southern District of Illinois
No. 07-2576 v.	]	
	]	No. 07 cr 40040
DENNIS FRICHTL Defendant-Appellant	]	G. Patrick Murphy, Chief Judge

ORDER

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED tha this appeal is DISMISSED for lack of jurisdiction.

In the present case, defendant-appellant Dennis Frichtl appeals an order disqualifying his

attorney. But defendant-appellant Frichtl's criminal case is not at an end, and a defendant in a criminal case may not immediately appeal a disqualification order. See *Flanagan v. United States*, 465 U.S. 259, 260 (1984)